COMPENSATION APPEALS FORUM

Workers' Compensation
Appeals Tribunal

Tribunal d'appel
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Compensation Appeals Forum

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Message from the Editors
Message de la rédaction

Welcome to the latest issue of the *Compensation Appeals Forum*.

In the Forum we publish analytical comment from our consituencies and other observers concerning the Tribunal's decisions and processes or general compensation principles.

We invite readers to submit papers, case comments, letters and replies to articles appearing in previous issues, for consideration for publication. Submissions may be written in either English or French and they will be published in the language in which they are submitted. All submissions should be directed to the address on the title page of this publication.

Submissions will be reviewed by the editorial board, and will not be seen by decision-making members of the Tribunal until published. The Board reserves the right to reject, edit or condense submissions and does not assume responsibility for the loss or return of manuscripts. ■

C'est avec plaisir que nous vous présentons le dernier numéro du *Compensation Appeals Forum*.

Dans cette publication, nous publions des articles analytiques que nous soumettent divers groupes intéressés. Ces articles portent sur les décisions et les procédures du Tribunal et sur des principes généraux d'indemnisation.

Nous invitons nos lecteurs à nous soumettre des articles, des commentaires sur des cas et des lettres ainsi que leurs réactions aux articles déjà parus. Les articles soumis aux fins de publication doivent être rédigés soit en français soit en anglais et sont publiés dans la langue dans laquelle ils sont soumis. Tous les articles devraient être expédiés à l'adresse indiquée sur la page couverture de cette publication.

Le comité de rédaction examinera les articles soumis, et les membres des jurys du Tribunal n'en prendront pas connaissance avant leur publication. Le comité de rédaction se réserve le droit de refuser, de réviser ou de condenser les articles soumis et ne se tient responsable ni de leur perte éventuelle ni de leur renvoi. ■

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THE ROLE OF THE WORKERS' COMPENSATION APPEALS TRIBUNAL IN THE ONTARIO COMPENSATION SYSTEM

*S. Ronald Ellis, Q.C.**

This is the text of a speech presented to the Association of Workers' Compensation Boards of Canada, 64th Annual Conference — St. John's Newfoundland, July 1990. The speech was given by way of contribution to a panel presentation on the topic: The Role of Independent Appeals Bodies in the Compensation System.

The most useful contribution I can make to this topic in the time allotted this afternoon is to describe the role of the Ontario Workers' Compensation Appeals Tribunal in the Ontario workers' compensation system.

This is a timely occasion for such a description. On the three previous occasions when I have had the pleasure of attending this annual conference it would not have been possible to be entirely confident as to what role the Tribunal was in fact destined to play in Ontario.

However, in June of this year — two short months ago — the Ontario WCB's Board of Directors released its surprising decision in its section 86n review of the Appeals Tribunal's Decision Nos. 915 and 915A. In my view, that decision — a unaminous decision in which both the employer and worker members of the Board joined — now makes it possible, for the first time, to describe the Ontario Appeals Tribunal's full, systemic role with some assurance.

The Ontario Workers' Compensation Appeals Tribunal was established in 1985 as an independent, tri-partite, adjudicative institution with the responsibility for hearing and determining appeals by workers or employers from final decisions, orders or rulings of the Ontario WCB.

The Appeals Tribunal is intended to be the final level of appeal. Its jurisdiction does not arise until after the WCB has itself finally finished with the case.

And, of course, the main thing about the Tribunal is its complete independence from the WCB.

Appeals to the Tribunal are not appeals in the law's usual understanding of the term. The Tribunal has the same investigative powers as the WCB and like the WCB is directed by the statute to decide cases on their "real merits and justice".

Accordingly, the Tribunal conducts a trial *de novo*, relying heavily on the existing reports in the WCB's file but hearing direct testimony from witnesses concerning factual issues; and, on medical issues, accepting new medical reports, ordering new medical investigation where that is felt to be necessary, and hearing testimony from doctors where the written reports are not thought to provide a sufficient understanding.

Hearings are usually structured rather like a labour arbitration hearing, with the representative of the worker — who is usually the appellant - presenting the worker's case first, and the employer, if it is participating, responding; with the worker's representative being given the final say. Witnesses are examined under oath and are cross-questioned where necessary and full argument on the issues is heard.

The Tribunal's own Counsel will sometimes participate in the hearing with additional questions or submissions.

Each member of the panel feels free to ask additional questions and to participate with the representatives in discussions concerning the evidence or the issues. A court reporter takes a record of the proceedings. A fully reasoned written decision is made. All decisions are public and, what is more, all decisions are made accessible to the public.

Implicitly present in every case is the question as to whether what the WCB has decided in the case accords with the requirements of the law.

This question, of course, includes the question of whether the policy the WCB has applied conforms with the law.

Where a Tribunal panel feels a special need for information about the nature of WCB policies and the justification for them, it will invite the WCB administrators to make submissions to the panel. These will usually be written submissions — shared with the parties, with the parties having the opportunity to respond — but on occasion they will be made orally at the hearing.

To those of you familiar with the previous appeal structure in Ontario, it will be obvious that the 1985 introduction of an independent Appeals Tribunal was a radical reform.

From a strategic perspective, perhaps of most concern to employers and to the WCB was the obvious threat to the WCB's control of the system from a policy point of view. During the drafting of the 1985 legislation, this threat was not lost on the WCB or the Government, and indeed, Professor Paul Weiler who, as most of you will know, wrote the report from which these reforms emerged, had also been concerned that some limits be imposed on the new Appeals Tribunal's ability to run away with the WCB's policy.

It was generally acknowledged that in the new legislation there had to be some balancing structure that would preserve an effective major role for the WCB on policy issues, while not emasculating the Tribunal's ability to supervise the system's compliance with the law, even — perhaps especially — on policy issues.

It is my personal belief that it is now apparent that an effective balance in this regard has been struck in Ontario.

The structure supporting this balance is comprised of a number of elements, all of which are important, but at the centre of that structure is the WCB's Board of Directors' statutory right to review a Tribunal decision on an issue of policy and general law — *i.e.*, the controversial section 86n.

I will confine the rest of my remarks to a description of how that section works and what its effect is now understood to be.

The section reads as follows:

> 86n(1). Where a decision of the Appeals Tribunal turns upon an interpretation of the policy and general law of this Act, the board of directors of the Board may in its discretion review and determine the issue of interpretation of the policy and general law of this Act and may direct the Appeals Tribunal to reconsider the matter in light of the determination of the board of directors.

For the first four years of the Tribunal's life, the meaning of this section was widely regarded to be ambiguous on the important question as to whom it left the final say on issues of policy and general law.

The speculation centred on the probable meaning and effect of a direction to "reconsider": Did the section leave the Tribunal free to reconsider in the light of the Board of Directors' determination of the issue, but then to come to the same decision as before?

No one can doubt, I think, that any casual reading of these words would leave anyone puzzled on that issue, and the fact is that the system was marked for four years by significant uncertainty on this crucial point. The Board of Directors did not have the power to say what it meant, and the Tribunal

was prevented from doing so, except in the context of a case which required the section to be interpreted. This had to wait for an 86n decision by the Board of Directors.

From a longer term perspective, that long uncertainty may not have been such a bad thing, but in the short term, there is no doubt that the lack of a firm answer on such a critical question tended to be destabilizing.

The other important issue that was thought to be uncertain under the section 86n language was exactly what constituted an "issue of policy and general law" on which either the Board of Directors or the Tribunal was going to have the final say.

It behooves me, to make it clear, here, in this company, that at least the Tribunal always understood that its only jurisdiction over WCB policies was to determine whether or not the policies complied with the requirements of the Act. Thus whatever else the final-say issue related to, it was clear to us that it did not involve a possible final say for the Tribunal concerning the substantive merits of WCB policies. We were always clear — and remain clear — that as long as a WCB policy complies with the law, its relative substantive merits are of no concern of ours — whatever, section 86n means.

The occasion for an interpretation of section 86n by the Tribunal arose for the first time in 1989. The case reference is *Decision No. 42/89* [12 W.C.A.T.R. 85]. The opportunity for the Board of Directors to review that interpretation arose in the Board's section 86n review of the Tribunal's Decision Nos. 915 and 915a which, as mentioned, was released June 1st.

What has surprised all observers and critics is that the Tribunal and the Board of Directors appear, at the moment at least[1], to have largely agreed on the interpretation, and no court challenge of either decision has been mounted and none is expected.

I pause to emphasize that this is an agreement about what the section as written means. The political debate between the employer and worker communities as to whether the Board of Directors or the Tribunal **should** have the final say continues in Ontario. [*Ed. note: See the comments of Gordon F. Wilson concerning* Decision No. 42/89 *at p.7 of this issue.*] It is an issue which is on the agenda of the current Green Paper study by the Ministry of Labour, and the employer and worker members on the WCB Board of Directors may be expected to have shared their respective communities' points of view on the substantive issue.

What then do we agree section 86n, as now written, means?

First, the Board of Directors and the Tribunal are agreed that the Board of Directors' power to review under section 86n arises whenever a Tribunal decision holds that a policy of the WCB is inconsistent with any provision of the Act.

The only subject matter of the review process, it is clear, is the compliance of a WCB policy with the law.

(For these purposes, of course, an absence of policy is a policy.)

It needs also to be noted that whether or not any particular decision will be reviewed is entirely within the discretion of the Board of Directors. A section 86n review is not just another step in the appeal process. It cannot be triggered merely by application of a party.

The 86n review process is cumbersome, long and costly. It involves an 11-member Board of part-time directors, and a process which by statute requires all parties "likely to be affected" to be given the opportunity to at least make written submissions. Experience in Ontario indicates it is also difficult to resist some oral submissions as well.

While Professor Weiler appears to have contemplated the Board of Directors exercising the 86n

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1 Decision No. 42/89 is a majority decision with a significant dissent on the final-say issue. It is currently the only Tribunal decision interpreting s. 86n.

review power some 12 times a year, it is now clear to all concerned that the Board of Directors does not have the capacity to deal with more than one or two reviews per year — if that.

It is now well understood, therefore, that the 86n review process will be resorted to only as a last resort, for the purpose of resolving a major disagreement between the WCB and the Tribunal on a significant policy issue, and only after other avenues for reconciling the WCB and Tribunal positions have been shown to have been finally exhausted.

It is a procedure for handling major systemic issues and not for resolving issues in individual cases *per se*. The decisions selected for review are merely the convenient vehicles for this systemic adjustment.

Who then does have the final say? Well, it appears the Board of Directors does.

When the Board of Directors follows the section 86n procedure and comes to a determination on an issue that is different from the Tribunal determination, if the Board of Directors then directs the Tribunal to reconsider the matter in the light of the Board of Directors' determination, the Tribunal is now interpreting the section as requiring the Tribunal panel to be governed in its reconsideration of the case by the Board of Directors' determination of the issue.

Thus, in response to such a direction, the Tribunal's reconsideration of that case will involve, not reconsidering the issue which the Board of Directors has determined, but rather deciding what outcome of the case is indicated when the Board of Directors' view of the issue is **applied**.

There is, however, an important qualification. It is acknowledged by both the Tribunal and the Board of Directors, that if the Board were to be seen to have based its determination of the issue on a patently unreasonable interpretation of the Act, then the Tribunal would by law be required to treat that determination as being beyond the Board of Directors' jurisdiction, and therefore not binding on the Tribunal.

The next question, of course, is this: If the Board of Directors' 86n determination is binding on the Tribunal in the case in which it is made, is it binding on the Tribunal in subsequent cases?

Here, the answer is no ... but with a crucial qualification.

The Board of Directors' determination of an issue in one case is clearly not binding on the Tribunal in subsequent cases — there is nothing in the statute that would make it so — but the Tribunal has acknowledged that the law imposes an obligation on it to treat such a decision with substantial deference.

It will not be enough that a subsequent panel of the Tribunal thinks the Board of Directors' determination on the issue to be wrong. Before any such Panel will be entitled not to follow that determination, that Panel will also have to be satisfied that the determination is so wrong, to such substantial effect, that following it would clearly not be in the system's best interest, notwithstanding the system disruption which must inevitably be occasioned by a Tribunal refusal to follow a previous Board of Directors' section 86n determination of an issue.

And of course, from the Board of Directors' point of view, even if the Tribunal were to abuse its discretion in subsequent cases, the WCB still remains in ultimate control. For the Board of Directors has the final say in the subsequent cases, as well.

It is also clear, however, that the Appeals Tribunal's ability to supervise the system's compliance with the law at the policy level cannot be said to have been emasculated by these conclusions concerning the meaning of section 86n. The Tribunal continues to be — to use the Board of Directors' words — the "judicial branch" of the workers' compensation system in Ontario, and its capacity to police the WCB's conduct in this respect remains strong.

While it now seems evident that as long as the Board of Directors refrains from adopting a patently unreasonable interpretation of the Act, in the end the Tribunal will be unable to **impose** its views concerning the lawfulness of WCB policy, it is also clear that through its decisions in individual cases the Tribunal has the power not only to reject any patently unreasonable interpretation of the Act, but also, in other cases, to compel the Board of Directors to publicly review the Tribunal's views as to the illegality of a WCB policy, and to give written and public reasons for rejecting those views, if that is what the Board of Directors should decide to do.

A moment's reflection will show that that is no mean power.

Arguably, from a system point of view, it is all that an independent appeals body needs.

Thank you. ■

* *S. Ronald Ellis, Q.C., is the Chairman of the Ontario Workers' Compensation Appeals Tribunal.*

CASE COMMENT: DECISION NO. 42/89

*Gordon F. Wilson**

The following article was adapted from a letter, dated October 12, 1989, which was addressed to the Minister of Labour.

Decision No. 42/89 (1989), 12 W.C.A.T.R. 85, raises a number of fundamental issues for the workers' compensation system in Ontario. We in labour are deeply concerned about the negative effects that this decision will have on the ability of injured workers to receive justice from the system.

Decision No. 42/89 deals with the issue of who has the "final say" in workers' compensation cases, the WCAT or the WCB board of directors. The Chairperson of WCAT was joined by the employer panel member in deciding that section 86n of the *Workers' Compensation Act* (R.S.O. 1980, c. 539) gives the WCB board of directors the final say. The worker panel member dissented. This means that if a worker wins his/her appeal at the WCAT, the WCB can use section 86n to review WCAT's interpretation of the law, and then force WCAT to apply that interpretation when the WCB sends the case back for reconsideration. This decision severely undermines the integrity of the appeal process. *[Ed. note: For a further development in this area, see the WCB board of directors'* Review of Decision Nos. 915 and 915A *(June 1990).]*

In this decision the WCAT has effectively given up its independence from the WCB. Workers now no longer have the right to an appeal to a truly independent body. We felt that the right to an independent appeal authority was won in 1985 with *Bill 101 (Workers' Compensation Amendment Act, 1984 (No. 2)*, S.O. 1984, c. 58). We obviously feel betrayed by this decision. We cannot have trust or confidence in the appeal system and *Decision No. 42/89* will serve to only further exacerbate the difficulties we have under the Act.

Prior to 1985, workers had to appeal their cases to the WCB's internal "Appeal Board". Being part of the same organization it was quite natural for the Appeal Board to defend the decisions of the lower levels of the WCB. Its decisions were poorly reasoned, restrictive and did not abide by the spirit of the Act. The Appeal Board had no credibility, workers lost faith in it and, eventually, many gave up on it because it was next to impossible to get a fair hearing.

The WCAT means that for the first time workers could appeal their cases to an expert authority which would take a fresh and honest second look. While we in the Ontario Federation of Labour have expressed reservations about the legalism and often unnecessary complexities of the WCAT, we have always felt, at least up to now, that injured workers were getting fair hearings. The clock is now turned back since the WCB can overturn WCAT decisions.

The existence of section 86n in the Act is a primary problem behind the present situation but, at the same time, I am firmly convinced that the WCAT made serious errors in the decision itself. First and foremost, the WCAT said that a major reason for giving the WCB the final say was the allegedly "representative" nature of the WCB board of directors. I strongly disagree with this assertion. Nothing could be further from the truth. The WCB board **is not** equally representative of the workers and employers. The three labour representatives on the board, together with the injured workers' representative, are consistently outvoted on every key question by the employer representatives, the WCB administrators and the so called community/professional representatives. There is no doubt that the WCB is dutifully following the employer agenda. They have cut pension supplements, restricted entitlement for chronic pain, penalized high wage earn-

ers and are now in the process of imposing confining regulations to Bill 162 (*Workers' Compensation Amendment Act*, 1989, S.O. 1989, c. 47).

There are also other important errors made by WCAT in *Decision No. 42/89*. The majority said that the words of section 86n were ambiguous, but that in the context of the whole Act, the legislative intention was to give the WCB the final say. I am not a lawyer, but the words of section 86n seem unequivocal to me. They require only that, after a section 86n hearing by the WCB, the WCAT has to "reconsider" the matter "in light of" the directors' decision. Labour's position at the hearing in *Decision No. 42/89* was that these words should bear their ordinary meaning. The OFL said that the word "reconsider" was carefully chosen to allow the WCAT, after taking the WCB's views carefully into account, to confirm its original decision, if it saw fit. If the legislature had intended to **require** the WCAT to follow the WCB's interpretation, it would have used words such as "apply the Board's interpretation to the facts of the case".

On another point, the majority of the WCAT panel dismissed the March 1988 ruling of the Ontario Divisional Court in the case of *O.F.L. v. Ontario (WCB)*, (1988) 29 O.A.C. 215 (Ont. Div. Ct.). In this case we applied for a judicial review of the WCB's first use of section 86n powers. In the decision, the Court clearly stated that following a section 86n decision by the WCB, the WCAT would still be free to make a different decision. This is powerful support for our position that WCAT has the final say under the Act.

Finally, the panel majority has broadened the meaning of section 86n even beyond that called for by many members of the employer community. This was done by giving a broad interpretation to the words "policy and general law" of the Act. These are the words which give the WCB board of directors its initial jurisdiction to use section 86n. Only WCAT decisions which "turn upon" an interpretation of "the policy and general law" of the Act may be reviewed under section 86n. The OFL argues that the plain meaning of these words should be followed: that only WCAT decisions turning upon an interpretation of the "policy" of the Act **and** "general law" of the Act could be reviewed. Thus, cases turning only on matters of legal interpretation could not be reviewed under section 86n.

The WCAT majority has provided us with an astonishing reading of these words. Essentially, the majority has decided that any of the WCAT decisions which turns on an interpretation of the Act and on an interpretation of the WCB's policy regarding that part of the Act, is subject to section 86n. This virtually opens up any WCAT decision for a section 86n review.

In closing, I call upon the Minister of Labour to take immediate steps to renew the historic integrity of the workers' compensation system and reclaim the complete authority of the WCAT by advancing legislation which will:

1) create a bipartite WCB board of directors to ensure that the board truly becomes representative of the two parties of direct interest (labour and employers), and

2) repeal section 86n of the *Workers' Compensation Act.*

The historic compromise of 1915 saw workers in Ontario give up the right to sue negligent employers in exchange for no-fault wage loss compensation. My recommendations are a minimum requirement to restore the basic integrity and principles upon which the workers' compensation system was founded. ■

* *Gordon F. Wilson is the president of the Ontario Federation of Labour (CLC).*

A CRITICAL VIEW OF WCAT'S APPROACH TO LEAVE TO APPEAL CASES

*Gerald Zuk**

INTRODUCTION

The Tribunal has adopted very stringent standards in deciding leave to appeal cases. Leave to appeal is seldom granted. That should be apparent from any reading of its leave to appeal decisions. Also, the Tribunal has even gone so far as to say that the fact that the Leave Panel might have reached a different conclusion from that of the Appeal Board, based on the same evidence, is not a good enough reason to grant leave to appeal.

It is my submission that the standards the Tribunal has adopted for deciding this type of case are too stringent and that a careful examination of these standards shows that they are in fact fundamentally untenable.

Before I explain my position, it should be noted what the *Workers' Compensation Act*, R.S.O. 1980, c. 539, says about leave to appeal:

> **86o(3)** Leave to appeal a decision [of the Appeal Board] shall not be granted unless,
>
> (a) there is substantial new evidence which was unavailable at the time of the hearing by the panel; or
>
> (b) there appears to the Appeals Tribunal to be good reason to doubt the correctness of the decision.

In explaining my position, there are three areas I would like to cover: some general observations that are applicable to leave to appeal cases which suggest that the Tribunal should take a less stringent approach to granting leave to appeal; the Tribunal's view of "substantial new evidence," and the Tribunal's view of "good reason to doubt the correctness of the decision".

GENERAL OBSERVATIONS ON LEAVE TO APPEAL

The leave to appeal provision of the Act with the use of the phrase "leave to appeal . . . shall not be granted unless" does in fact suggest that a presumption exists that the Appeal Board decision is correct unless it can be shown otherwise. So looking at the standards the Tribunal has adopted in that context, it might on the surface seem reasonable that these standards are quite stringent. However, there are a number of facts about the Appeal Board and its decisions which do suggest that these decisions are more open to question than the Tribunal leave to appeal decisions would have us believe.

One is the fact that the government found it necessary to disband the Appeal Board and replace it with an independent Appeals Tribunal which in turn suggests that the decisions of the Appeal Board left a great deal to be desired, therefore any decision of the Appeal Board should be looked at with a very critical eye. That obviously is not an argument that would be accepted by the Appeals Tribunal in any leave to appeal case; nevertheless it offers a useful perspective on Appeal Board decisions in general.

Second, in many cases where the worker is seeking leave to appeal, the worker did not have access to his claim file prior to the Appeal Board hearing, so he really was at a marked disadvantage in addressing the WCB's reasons for denying whatever it was he was appealing to get. It is true that the WCB did provide the worker with a summary of the claim file, but certainly that is not the same as seeing the actual claim file. So, in that respect, the worker was effectively being denied "full opportunity for a hearing" which was his right under the Act. If he was denied full opportunity for a hearing in the past, then fair play would seem to require that he be given that opportunity now. I have not seen that mentioned as an argument in any leave to appeal decision, but I have no doubt that the Tribunal would reject it outright, saying that the WCB decision under appeal would show what the evidence was against the worker. There might also be something thrown in about WCB having the right to set its own procedures.

Third, any Appeal Board decision tended to be very blunt. The reasons for the decision were almost never fully explained. Whenever it is not fully known what the reasoning was that was used to arrive at a decision, that automatically makes the decision suspect. Why is this so? It is because the reasoning may have been faulty, and when the reasoning for any conclusion is faulty, there is a strong possibility that the conclusion will be faulty as well. I know from experience that the Tribunal does not accept this line of argument; nevertheless the Tribunal has repeatedly said about leave to appeal cases that it is not interested in hearing the merits of the case, just in hearing about the decision itself. In other words, this line of argument looks at the Appeal Board decision in abstract terms, shows it wanting in abstract terms, and the Tribunal has in effect said in leave to appeal cases that the decision for which leave to appeal is sought must be looked at in abstract terms.

I recognize that by objective standards the above points, whether each is considered separately or they are considered in total, do not provide sufficient reason to say that because a worker disagrees with an Appeal Board decision, then as a matter of course the worker should be granted a leave to appeal. Obviously leave to appeal decisions have to be made on a case by case basis, using some uniform criteria. But the point I am driving at is that given the context of Appeal Board decisions, the Tribunal should avoid being a defender of these decisions and look at these far more critically than has been the case in the past.

SUBSTANTIAL NEW EVIDENCE

A summary of what the Tribunal considers to be "substantial new evidence" is contained in *Decision No. 64* (1986), 2 W.C.A.T.R. 19:

1. The party seeking leave must, with the new evidence, demonstrate a significant reason why the matter should be re-opened.

2. The evidence must address the central issues considered by the Appeal Board in reaching its decision.

3. The evidence must be of such quality that when considered with all of the evidence available to the Appeal Board, it must establish a likelihood of the Appeals Tribunal reaching a different decision than was reached by the Appeal Board.

4. While a leave applicant may not have to establish that reasonable diligence could not have disclosed the new evidence, the Applicant will have to provide a reasonable explanation as to why the evidence was not available at the Appeal Board hearing.

There are two problems with this interpretation of the term "substantial new evidence". One problem relates to the defensive posture the worker is forced into when he obtains new evidence. The other problem has to do with showing that the evidence is in fact substantial.

As regards the worker being put into a defensive posture, the Appeals Tribunal is not only saying to the worker, "Well, you show us why this evidence is substantial", it is also saying "Why didn't you have it before"? It may be argued that there is nothing wrong with the Tribunal saying any of this, but I would disagree. Evidence speaks for itself; the most any appellant or representative can do at an appeal hearing is try to ensure that it is noted and correctly interpreted, so if the evidence is substantial, that should be apparent to the Panel. As for asking the worker why he did not have the evidence before, what difference could that possibly make as long as the evidence is in fact substantial? There is a statutory requirement that any Tribunal decision be on the real merits and justice of the case. Is it a "merit"

in any case why a worker did not have something before that he has now? Hardly. (Interestingly, I have on many occasions obtained a medical opinion for a Tribunal appeal which I did not have for the WCB Hearings Officer appeal. I have never been asked by the Tribunal why I did not have that opinion for the Hearing Officer appeal. Why should it be any different in a leave to appeal situation?)

As for the other problem I noted in the Tribunal's interpretation of the term "substantial" – to show that new evidence is in fact substantial – the Tribunal makes it very difficult to do this in two ways. First, the Tribunal seems very reluctant to accept that new evidence is substantial. For example, in *Decision No. 157* (October 1986), the appellant did present a new medical opinion; however the Panel did not consider this as "substantial new evidence" because it considered that the doctor who provided the opinion was merely stating a medical fact "from another perspective." Actually, if the evidence is from another perspective, that alone would seem to make it substantial, and the appropriate venue to decide whether it should be accepted or rejected would be an appeal hearing on the merits of the case. The second way the Tribunal makes it difficult to show that new evidence is substantial is that it has effectively set up a barrier to doing this. On the one hand, it says that it does not want to deal with the merits of the case; but on the other hand it says that the new evidence has to establish a likelihood of the Tribunal arriving at a different decision from that of the Appeal Board. If the latter is a criterion for deciding whether or not new evidence is substantial, then it is necessary that the merits of the case be addressed, because how else could it be determined what the outcome of it is likely to be? But, again, the worker is prevented from addressing the merits of the case because the Tribunal says it does not want to deal with that in a leave application.

To briefly summarize what I am saying about the Tribunal's view of what constitutes "substantial new evidence": There is an undue onus on any worker who has new evidence to show that it is substantial; the Tribunal appears very reluctant to accept that it may be substantial; and the nature of the proceedings can serve to prevent the worker from showing that it is substantial.

GOOD REASON TO DOUBT THE CORRECTNESS

It is often difficult to obtain new evidence. Most leave to appeal cases involve medical issues and any doctor who has treated a worker and supports the worker in a denied claim is likely as not to say "What can I say that hasn't been said before?" So, a leave to appeal application is likely to be on the basis that there is good reason to doubt the correctness of the decision.

Decision No. 131 (1986), 2 W.C.A.T.R. 77, outlines some situations where leave should be granted and states where it should not.

The situations where leave should be granted are stated to be as follows:

1. A clear error of law.

2. An error with respect to an important fact.

3. Absence of any evidence to support the finding in the Appeal Board decision.

4. An obvious oversight with respect to certain critical evidence (as contrasted with considering and rejecting such evidence).

It is difficult to disagree with any of these situations being a basis for doubting the correctness of an Appeal Board decision. However, there seems to be an assumption that as long as critical evidence was considered, there would be no obvious oversight with respect to it. I question that assumption for two reasons.

First, just because the Appeal Board considered evidence, does not necessarily mean that they interpreted it correctly. No doubt it would be gratifying to former members of the Appeal Board to know that the present Appeals Tribunal has so much faith in their ability to understand and interpret; but any human being, including those august individuals, has the potential to misunderstand and misinterpret. Also, most evidence in compensation cases is medical in nature and while many medical reports are concise and straightforward, some are not, which makes the matter of how the evidence was understood and interpreted even more crucial. So, just because the Appeal Board considered evidence does not necessarily mean that they fully comprehended it and interpreted it correctly.

The second reason I question the Tribunal saying that the fact that the Appeal Board considered all the evidence means there was no oversight in the decision-making process has to do with what weight was assigned to the evidence. The matter of assigning weight to evidence is discussed in *Decision No. 472* (November 1986) where the Panel stated, at p. 2:

> "Questioning whether the Board should have placed more weight on one medical report than another is not normally good reason to doubt the correctness of a decision".

In *Decision No. 595/89L* (September 1989) the Panel stated with respect to the same subject, at p. 3,

> ". . . this Panel, in dealing with a leave application, does not have jurisdiction to deal with the merits of the worker's claim which would result should we decide to reweigh evidence that was before the Appeal Board".

But by any objective standards some evidence is more weighty than other evidence and often the Appeal Board rejected the more weighty evidence. To illustrate: Anyone who has done a number of compensation appeals knows that some WCB doctors are notorious for one-line opinions saying "no relationship" in commenting on the relationship between a work accident and subsequent disability. Yet often more weight was assigned by the Appeal Board to an opinion like that than to a detailed opinion from the worker's own specialist as to why there was a relationship. The point, therefore, is that in order to know if there really was an error with respect to critical evidence, it is necessary to know how that evidence was weighed by the Appeal Board.

The situations which the Appeals Tribunal sees as warranting leave to appeal are far less contentious than what the Tribunal has said does not warrant leave to appeal.

Decision No. 131 states with respect to the latter, at p. 81:

> . . . it is not enough that the Tribunal would have reached a different conclusion had it heard the case in the first instance. That alone is not sufficient to justify interference with the intended finality of the earlier process. Leave to appeal, based solely upon reconsideration of the merits of the case, ought not to be granted.

I said in my opening remarks that the standards that the Appeals Tribunal has adopted for granting leave to appeal are fundamentally untenable and this set of statements, when carefully examined, shows why.

First, the defence the Appeals Tribunal has offered for saying that the fact that it would have reached a different decision than the Appeal Board based on the same evidence is not a good reason for granting leave to appeal should be noted. This defence is stated in *Decision No. 131*, at p. 80:

> . . . it is in the public interest that some finality exist in the compensation decision-making process. No legal or administrative body could function efficiently if it were subjected to an eternal tide of recycled appeals under a general power to reconsider past decisions. At some point there must be an end.

No one could seriously dispute that there should be an end in the decision-making process. But allowing more leave to appeal applications would not mean that there would be no end to the process. The end would be delayed in some cases, but inevitably there would be an end. It should also be noted that while it is in the public interest for there to be an end to the process, it is equally in the public interest that where there has been past injustice, that such injustice be rectified as much as possible.

As for the observation about the Appeals Tribunal functioning inefficiently "if it were subjected to an eternal tide of recycled appeals ...", one would hope that the guiding principle for any decision-making by the Tribunal would be that the decision "be on the real merits and justice of the case" as required by s. 80(1) of the Act, not the principle of what is most efficient for the Appeals Tribunal. But apart from that, it strains the bounds of credibility to suggest that allowing more leave to appeal applications would result in "an eternal tide of recycled appeals".

So the Tribunal's defence of its position that because it likely would reach a different decision from that of the Appeal Board in a case is not a good reason to doubt the correctness of the Appeal

Board decision really is based on irrelevant considerations, and, on the surface anyway, seems to play havoc with the real merits and justice provision of the Act.

Actually, it would be better for the Tribunal not to concede a position like that; better because when it is conceded, the worker in such a case will have any feelings that he is the victim of an injustice reinforced, and better because the Tribunal would not leave itself open to as much criticism.

So much for the Tribunal's defence of its position. Now I would like to show why it is wrong for the Tribunal to have that position in the first place.

The first reason has to do with the inferences that can be drawn from any statement that the Tribunal likely would have reached a different decision from that of the Appeal Board based on the same evidence.

One inference is that the Appeal Board may have misinterpreted the evidence. As I noted earlier, any misinterpretation of evidence makes the conclusion based on that evidence suspect, *i.e.*, giving us good reason to doubt the correctness of the decision.

Another inference is that it is possible that the evidence is approximately equal in weight, *i.e.*, one could make a decision for or against the worker based on the evidence and either decision would be just as reasonable. However, in that scenario the benefit of the doubt principle would require that the decision be in the worker's favour, but obviously the Appeal Board did not apply that principle.

The third inference that can be drawn is that ultimately the Tribunal is having to express doubt about its own decision-making capabilities in order to defend a decision of the Appeal Board. (It is difficult to say this, since modesty has never appeared to be one of the Tribunal's attributes.) This point may require some explanation. Either the decision of the Appeal Board is correct or it is not. The Tribunal is saying it would probably arrive at a different decision. So the question becomes one of which decision is correct, the one made by the Appeal Board or the one the Appeals Tribunal would make. The Tribunal ultimately is saying: "Well, we really aren't sure if the decision we would make would be correct, so we'll stand by the one that the Appeal Board made." (It hardly inspires confidence in the body entrusted as the final arbiter in all workers' compensation matters when that body in effect says that it does not know if a decision it would make would be correct, but that is another matter.)

It should also be noted that the Tribunal is taking a kind of self-contradictory posture here. It could legitimately be asked of the Tribunal: "If you are not sure that the decision you would make on the merits of the case would be correct, i.e., you have doubts about your decision-making ability, how can you be sure that the decision you are making on the leave application is correct?"

Actually, still in regard to this point, if it were a general rule that just because the Tribunal would arrive at a different decision from that of another decision-making body based on the same evidence, that is not a good enough reason to overturn the original decision, then obviously the Tribunal could never overturn any decision of the Compensation Board and there would not be any need for an Appeals Tribunal.

So the inferences that can be drawn when the Tribunal makes the statement that it would have arrived at a different decision from that of the Appeal Board are: first, there is doubt about the Appeal Board's interpretation of the evidence in the case; second, there is a clear implication that the benefit of the doubt principle was not applied in favour of the worker; and, third, to defend its position not to grant leave to appeal in a case where it would arrive at a different decision, the Tribunal puts itself in a self-contradictory position. Again, I would submit that this position over-all is fundamentally untenable.

I now would like to address the statement in *Decision No. 131* that "leave to appeal based solely on the merits of the case ought not to be granted", as a second reason why this position is untenable.

There are a number of difficulties with this statement.

One, obviously, is that the Act requires that any decision of the Tribunal "be on the real merits and justice of the case". It does not say that leave to appeal cases are to be an exception. It may be that there are some legalistic arguments about whether or not this requirement is literally applicable to leave cases, although I do not know what these would be, but I would point out that section 86o(3) certainly does not say that the Appeals Tribunal is prevented from deciding if there is

good reason to doubt the correctness of the Appeal Board decision by looking at the merits of the case.

A second difficulty is that it defies all common sense to suggest that it can be concluded that there is or is not good reason to doubt the correctness of the decision on a case without considering the merits of the case itself. That would be akin to a bank trying to decide if it would be the correct decision to lend someone money without considering the financial status of the person. Actually, noting some of the criteria the Tribunal has suggested for determining whether or not there is good reason to doubt the correctness of a decision, in particular "absence of evidence to support a finding" and "an error in respect of an important fact in the case", it is by definition necessary to consider the merits of the case.

A third difficulty with this statement is this: if reconsideration of the merits of the case shows that there is in fact good reason to doubt the correctness of the Appeal Board decision, does that mean that leave to appeal the decision should not be granted? Again, the Act does not specify how it is to be determined if there is good reason to doubt that decision, but what the Act does specify is that if there is good reason to doubt that decision, then leave to appeal shall be granted. Very simply, any decision by the Tribunal not to grant leave to appeal when there is good reason to doubt the correctness of the Appeal Board decision, regardless of how that reason was determined, would be contrary to the Act.

So, what the Tribunal is saying about deciding if leave to appeal should be granted based on the merits of the case simply is not sustainable, based on what the Act says and based on any commonsense view.

To briefly summarize what I have said about the Tribunal's view of what constitutes good reason to doubt the correctness of an Appeal Board decision: The Tribunal has outlined some situations where there obviously would be good reason for such doubt. However, it does not go far enough in describing these situations; specifically it does not want to enter into looking at the Appeal Board's treatment of the evidence. But then the Tribunal takes the position that even when it would have reached a different decision from that of the Appeal Board based on the same evidence, this by itself is not a good reason to doubt the correctness of the Appeal Board decision. This position is incompatible with the real merits and justice provision of the Act; self-contradictory with the Tribunal's role in the compensation system; and the defence the Tribunal has offered for it ultimately is based on irrelevancies, is self-contradictory, and ultimately is at odds with the grounds for granting leave to appeal as stated in section 86o(3).

SUMMARY

I have argued that the Tribunal's standards for granting leave to appeal are too strict. This argument is made with reference to the nature of Appeal Board decisions, the Tribunal's view of what constitutes substantial new evidence and good reason to doubt the correctness of an Appeal Board decision. The thrust of my argument is that Appeal Board decisions need to be looked at more critically than the Tribunal has been willing to look at them, that the Tribunal has put obstacles in the way of showing that new evidence is substantial, and that the position of the Tribunal with respect to good reason to doubt the correctness of any Appeal Board decision is fundamentally untenable, because it is based on irrelevant considerations, self-contradictory and could and does deny workers leave to appeal when there is in fact good reason to doubt the correctness of the Appeal Board decisions they want to appeal, all of which is inconsistent with the Act. ■

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BILL 162 AND THE NEW 'SPECIAL STATUS EMPLOYEE'

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DEFINING THE NEW 'SPECIAL STATUS EMPLOYEE'

In attempting to make the workers' compensation system in Ontario fairer without increasing costs, *Bill 162* (*Workers' Compensation Amendment Act, 1989*, S.O. 1989, c. 47) significantly increased the rights of injured workers *[Ed. note: The Transitional Provisions, dealing with "Permanent Partial Disability Supplements" came into force on July 26, 1989. The rest of* Bill 162 *was proclaimed in force on January 2, 1990.]* The Bill creates a more complex system of calculating permanent disability benefits, and entitles injured workers to recover for both future lost earning power and non-economic losses. As well, the Bill creates a more comprehensive system of medical and vocational rehabilitation than previously existed under the *Workers' Compensation Act*, R.S.O. 1980, c. 539 (the Act) and it specifically requires employers to offer re-employment to their injured workers as soon as they are capable of returning to work. The legislation even provides that the duty to reinstate takes precedence over all but the seniority provisions of any collective agreement which is in force at the workplace, unless the terms of that agreement provide the injured worker with greater reinstatement rights than those under the Bill. Finally, employers are required to continue making employment benefit contributions on behalf of injured workers, and may be subject to stiff penalties in the event that they fail to do so.

The broad scope of these reforms, and the special treatment afforded to injured employees under *Bill 162*, exemplifies a developing trend in Ontario employment legislation. More than ever before, injured and disabled employees are given a "special status" in the Ontario work force; a status which gives this group superior rights and powers over and above those of ordinary employees. For example, the effect of the statutory duty of accommodation contained in the *Human Rights Code, 1981*, S.O. 1981, c. 53 (the Code) means that employers may be required to hire an employee who cannot perform the essential duties of the job merely because that employee is handicapped. This duty can be mitigated only by proof that the accommodation causes the employer "undue hardship", and the jurisprudence in this regard indicates that the Commission will only accept this defence in extreme circumstances.

It is not insignificant that the reinstatement provisions of *Bill 162* also refer to an employer's duty to "accommodate the work or the workplace to the needs of a worker who is impaired". More and more employers in Ontario are being required to expend time and resources to satisfy the needs of certain employees at the expense of their general work force. The question arises, therefore, whether these legislative initiatives which initially were designed to assist the disadvantaged have in fact gone too far in creating the "special status employee".

To assist each of you in making up your own mind about this controversial question, the following will critically examine the most recent addition to the legislative development of the "special status employee": *Bill 162*.

The following critically examines each aspect of the Bill, and special emphasis is placed on describing the scope of obligations and duties imposed on employers under the new system. The paper concludes with a series of strategies and initiatives designed to assist employers in formulating a coherent policy with respect to workers' compensation which will both minimize costs and promote greater positive employee relations.

PERMANENT DISABILITY BENEFITS UNDER THE NEW DUAL AWARD SYSTEM

Central to the amendments contained in *Bill 162* is the new dual award system of calculating permanent disability benefits. Under the new regime, which repeals the previous system of calculating disability benefits, permanently impaired workers are entitled to compensation for both actual lost earning capacity and non-economic losses. In taking account of how the injury affects both the earning power and quality of life of the individual injured worker, the system strives to promote greater fairness in the calculation of benefits without increasing costs. Whether the system attains these goals will ultimately depend on the consistency with which the criteria set out in *Bill 162* are applied to individual cases. An examination of how the process has changed under *Bill 162* is a first step in developing a critical understanding of employers' current obligations under the new dual award system. Moreover, because the provisions set out in *Bill 162* only apply to injuries which occur on or after January 2, 1990, such a review will also assist employers to understand the extent of their obligation to workers who have been permanently disabled prior to this date.

Permanent Disability Pensions Under the Pre-1989 Act

Prior to the enactment of *Bill 162*, s.45(1) of the Act provided for periodic payments to workers suffering permanent disabilities. That section stated:

> 45-(1) Where permanent disability results from the injury, the impairment of earning capacity of the worker shall be estimated from the nature and degree of the injury, and the compensation shall be a weekly or other periodic payment during the lifetime of the worker, or such other period as the Board may fix, of a sum proportionate to such impairment not exceeding in any case the like proportion of 90 percent of the worker's net average earnings.

Though that section provided that permanent disability pensions shall be proportionate to the "impairment of earning capacity of the worker", in fact the extent to which a particular worker's capacity to earn income had been affected by an injury was never considered by the Board in assessing compensation. Instead, the Board's practice was to award pensions solely on the basis of the nature and degree of the injury, regardless of how a particular injury affected the earning capacity of a particular worker.

This objective method of calculating compensation was affirmed by the Workers' Compensation Appeals Tribunal in its leading case on pensions under the old Act, *Decision No. 915* (1987), 7 W.C.A.T.R. 1, and to a certain extent, this process was a creation of s.45 itself. Subsection (3) of that section provides that:

> (3) The Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations that may be used as a guide in determining the compensation payable in permanent disability cases.

To assist it in the expeditious calculation of compensation for a worker's loss of earning capacity, the Board developed the "Permanent Disability Rating Schedule", commonly known as the "Meat Chart". The Schedule lists various injuries to body parts and assigns bench-mark percentages to each. The percentages represent the degree to which a particular injury is considered to impair the earning capacity of an *average unskilled worker*. For example, amputation of most of an arm is rated at 70%, while total immobility of the spine is assigned 60%. Where a worker suffered only partial loss of a function or body part listed in the Schedule, the amount of compensation is further reduced by the extent of the function or limb remaining. According to the Schedule, only blindness was deemed to constitute a 100% impairment.

In *Decision No. 915*, the Tribunal concluded that there is no scientific basis for the percentages listed in the Schedule. Although the Tribunal said that the various ratings appeared to be internally consistent, it found no clear correlation between actual injuries and their assigned percentages.

The Tribunal also noted that it was generally believed that if an accident leaves an injured worker totally unemployable, then that worker will receive full compensation. The Tribunal characterized this belief as a "major public misconception" regarding the operation of the compensation system. In fact, the legislation gener-

ally provided only partial pensions estimated on the basis of the objectively determined impact of similar injuries on the earning capacity of an average unskilled worker. It was both possible, and indeed fairly common, for the Board to conclude on the one hand that a worker had been rendered totally unemployable as a result of an injury, and yet award a pension amounting to only a small fraction of the worker's pre-injury net average earnings.

Such under-compensated workers could apply for temporary supplements if they could show that their particular earning capacity was significantly more impaired than was usual for the nature and degree of the injury. The supplement was conditional upon the worker's co-operation in, and availability for, medical or vocational rehabilitation as well as his availability for suitable and available employment. However, because supplementary benefits were only temporary, in practice, many permanently impaired workers were forced to resort to welfare payments to compensate for the inadequacy of their pensions. Only these provisions of the pre-1989 Act regarding the entitlement to and calculation of supplementary benefits have been repealed with respect to workers injured prior to the enactment of *Bill 162* on July 26, 1989. While such workers continue to be governed by all other provisions of the Act, all injured workers in Ontario are entitled to supplementary benefits calculated according to the formula set out in *Bill 162*. This means that all current recipients whose pensions do not adequately make up for their loss of earning capacity may be eligible for supplementary benefits calculated under *Bill 162*, regardless of whether the injury occurred before or after the Bill received Royal Assent.

While the fact that workers were being under-compensated under the old system was a key motivation for the reforms contained in *Bill 162*, a further significant factor was that many pensioners were being over-compensated by the plan. This was made possible by the fact that the pensions were paid for the lifetime of the injured worker, and were not reduced if the worker returned to work. In fact, the statistics reveal that 80% of WCB pensioners were working to some extent, and that many have suffered no loss of employment income. It was in response to these inequities, therefore, that the major reforms to the pension system contained in *Bill 162* were developed.

Calculating Pensions Under Bill 162

The reforms contained in *Bill 162* radically alter the process of calculating the pension benefits of permanently disabled workers. In taking account of the needs of the individual worker, and how the injury affects him or her personally, it is the aim of the Bill to provide benefits which more accurately reflect individual losses, reduce over-and under-compensation, and thereby make the system fairer without increasing its costs.

The Bill strives to attain these goals by compensating permanently impaired workers for:

(a) actual lost earning capacity, and

(b) non-economic losses.

As well, because the new system only provides benefits for injured workers up to age 65, the Bill also provides for compensation for loss of retirement income. The new mechanisms created by the Bill for calculating each type of loss are examined below.

Future Lost Earning Capacity

Under the new system, workers are entitled to compensation for the future loss of earnings where the injury results in either permanent impairment or in temporary disability which lasts for at least twelve consecutive months. The amount of compensation to which the worker is entitled is limited to 90% of the difference between:

(a) the worker's net average earnings before the injury; and

(b) the net average earnings that the worker is likely to be able to earn after the injury in suitable and available employment.

The initial determination of compensation for loss of earnings is to be made whenever possible according to the following schedule:

(a) in the twelfth consecutive month during which the worker is temporarily disabled;

(b) within one year after notice of the accident in which the worker was injured is given under s. 20, if during that year the Board determines that the worker is permanently impaired; or

(c) within 18 months after notice of the accident in which the worker was injured is given under s. 20, if the worker's medical condition precludes a determination within the time stated in clause (a) or (b), whichever applies.

These time limits do not apply to workers impaired by industrial disease. Where the worker is not receiving compensation, the time limits may be extended by the Board in order to resolve any dispute concerning the worker's entitlement to compensation.

In order to ensure that the injured worker's projected income is relatively accurate over time, the Board will review its determination of the amount of compensation at least twice—after two years from the initial determination, and then again after five years. The Board, however, will not vary the amount of the compensation payable as a result of a review unless the amount of the variation would be equal to at least 10% of the amount of the compensation being paid at the time of the review.

Compensation for economic loss is to be paid to the worker in monthly periodic payments up to age 65. If the amount of compensation is 10% or less of the compensation for full loss of earnings, the Board may commute the amount to a lump sum payment unless the worker elects otherwise. All compensation for loss of earnings will be adjusted for inflation by indexing the compensation annually.

Bill 162 specifies a number of factors which the Board will consider in determining the amount that a worker is likely to be able to earn in suitable and available employment. Those factors are:

(a) the net average earnings, if any, of the worker at the time the Board determines compensation;

(b) any disability payments the worker may receive for the injury under the Canada Pension Plan or the Quebec Pension Plan;

(c) the personal and vocational characteristics of the worker;

(d) the prospects for successful medical and vocational rehabilitation of the worker;

(e) what constitutes suitable and available employment for the worker; and

(f) such other factors as may be prescribed in the Regulations.

In determining the amount of compensation payable for economic loss, a great deal will depend on what is determined to be "suitable and available employment" for the individual injured worker. Employers are concerned that the Board will construe this phrase narrowly and thereby not consider employment that the injured worker could easily obtain. For instance, a high-paying position involving a relocation may not be considered "suitable" by the Board. As a result, the compensation paid to the worker for economic loss may be based on a lower-paying position. If the worker eventually relocates and accepts the higher-paying position, the result will be over-compensation for his economic loss, potentially until age 65.

Worker groups, on the other hand, are concerned that the Board will create "phantom jobs" for injured workers that are higher-paying than the positions the worker is actually able to obtain. If this occurs, the worker could be substantially underpaid, again until age 65.

In order to overcome fears regarding the ambiguity of this term, the legislation grants the Board the power to establish criteria for what constitutes suitable and available employment. These criteria will likely include the worker's age, education, pre-accident occupation and experience, ability to communicate and the availability of suitable employment in the worker's locality. In addition, when establishing these criteria, the Board is expressly to have regard to:

(a) the fitness of the worker to perform work;

(b) the health and safety consequences of working in a particular work environment given the worker's impairment;

(c) the existence and location of potential employment opportunities in the labour market in which the worker is expected to be employed; and

(d) the likelihood of the worker securing employment.

Once the Board determines the post-injury earning capacity of the worker, that determination may be appealed to the Tribunal by either the worker or the employer. Since post-injury earning capacity will not depend on what the worker

is actually earning, but on what he is able to earn in suitable and available employment, much will depend upon what constitutes such employment for the particular worker. If the employer establishes that the worker is able to fulfil his previous job requirements, or those of a higher-paying position, and that such work is available, the worker would not be entitled to compensation for lost earning capacity even though his disability continues to exist.

Supplementary Benefits Under Bill 162

[Editor's note: The following discussion respecting supplementary benefits applies only to workers injured before January 2, 1990. For workers injured on or after that date, see the provisions of s.45a(8), (9).]

As indicated above, the Board's policies regarding supplements under the old Act allowed temporary financial supplements only for workers who had experienced an impairment of earning capacity significantly greater than was usual for the injury. In addition, the supplement was only available where there would have been a rehabilitative benefit derived by the worker. As a result, supplements were only provided during a period of rehabilitation to assist the worker in obtaining or preparing for suitable employment.

Under *Bill 162*, workers who are likely to benefit from vocational rehabilitation programs will continue to receive supplementary benefits. The intent of the program is to increase the worker's earning capacity to the extent that the worker's post-rehabilitation earning capacity and disability pension together are able to approximate the worker's pre-injury earnings. The supplement is payable only during the period that the worker participates in the Board-approved rehabilitation program.

In addition to this temporary supplement, the new provisions provide for a permanent supplement to those workers who are not likely to benefit from a vocational rehabilitation program or whose earning capacity is not increased sufficiently by the program that has been provided. The amount of the supplement is intended to raise the worker's total post-injury earnings, including both the supplement and the permanent disability pension, to the same level as the worker's pre-injury earnings. The amount of the permanent supplement, however, shall not exceed the amount of a full monthly pension under the *Old Age Security Act*, R.S.C. 1985, c.0-9. In calculating the supplement, the Board shall include any amounts received by the worker for the disability from the Canada or Quebec pension plans and shall also have regard to the effect of inflation on the worker's pre-injury earning rate.

As with compensation for economic loss, the amount of permanent supplements is to be reviewed by the Board after two years and five years in order to re-calculate the amount of supplement in light of any changed circumstances.

Compensation for Non-economic Loss

The second branch of the dual award system created by *Bill 162* takes account of the non-economic losses suffered by a worker in calculating the appropriate level of compensation. Under the new system, such compensation is usually paid as a one-time lump sum amount calculated after maximum medical rehabilitation has been achieved. However, if the compensation is greater than $10,000.00, it shall be paid as a monthly payment for the life of the worker unless the worker elects to receive the compensation as a lump sum.

Compensation for non-economic loss is only available for workers with a permanent impairment that remains after maximum rehabilitation has taken place. Regardless of the severity or duration of a temporary disability, if there is no permanent impairment, then there can be no award for non-economic loss under the new system. In addition, the legislation makes it clear that the compensation is only for the existing and future consequences of the injury and, therefore, is not intended to compensate the injured worker for any of the past consequences of the injury.

The amount of compensation is calculated by multiplying a worker's percentage impairment by $45,000 +/– $1,000 for each year younger than or older than 45 years of age that the worker is, to a maximum of $20,000 added or subtracted. The formula may be expressed numerically as follows:

> Amount of compensation = % of impairment x [45,000 +/– ($1,000 per yr. over/under age 45 to max. $20,000)].

For example, a worker age 25 or less with a permanent total impairment would receive

$65,000, the maximum amount possible for non-economic loss *i.e.*, 100% of ($45,000 + $20,000), whereas a worker age 50 with a 20% impairment would receive only $8,000, *i.e.*, 20% of ($45,000 – $5,000).

The Board determines a worker's percentage of total impairment on the basis of an authorized medical assessment. The medical assessment is conducted when the worker has reached maximum medical rehabilitation. The medical practitioner who makes the assessment is selected by the worker from a roster provided by the Board. Where the worker fails to make a selection within 30 days after the Board provides the worker with the roster of medical practitioners, a medical practitioner will be appointed by the Board. In conducting the assessment, the practitioner will assess the worker's degree of impairment according to:

(a) a prescribed rating schedule, and

(b) existing and anticipated likely future consequences of the injury.

Although these assessments will have regard to both existing and anticipated likely future consequences of an injury, *Bill 162* does not indicate how "likely" the future consequences must be before they will become compensable. Moreover, though the Bill does not indicate which prescribed rating schedule shall be used in calculating a worker's percentage of permanent impairment, it is likely that the Board will use the American Medical Association Schedule. This Schedule is similar to Ontario's present Meat Chart although it is more detailed.

Once the medical examination has taken place, a copy of the medical assessment is to be sent to both the employer and the worker. Within 45 days of this, either the worker, the employer or the Board may require a second medical assessment. If a second assessment is not required, however, the Board is to determine the degree of the worker's impairment forthwith after the expiry of the 45-day period. If a second assessment is required, the determination of the degree of the worker's impairment is to be made once the second medical assessment is received by the Board.

Where there has been a significant deterioration of the worker's condition that was not anticipated at the most recent medical assessment, the Bill allows workers to apply for a re-determination of the degree of their permanent impairment. Such an application can only be made after 12 months have elapsed since the most recent decision regarding the degree of permanent impairment. No limit is made regarding the number of times a worker can apply for reconsideration.

Two anomalies of the re-determination process should be noted. First, a worker can only apply for a reconsideration if the Board has determined that the worker has a permanent impairment. Once the Board has determined that a worker does not suffer from a permanent impairment, that worker cannot apply for a reconsideration at a future time even if there is a significant deterioration of his condition. This situation would remain at least until the Board has made a further determination regarding the existence of a permanent impairment.

The second anomaly is that the employer cannot make an application for reconsideration under the Bill. This means that there can be no reconsideration of the amount of compensation for non-economic loss even if there is a significant improvement in the worker's condition or if anticipated consequences do not actually occur.

Compensation for Loss of Retirement Income

Although under the pre-1989 Act, permanent pensions were paid for life, compensation for loss of earnings will now only be paid until age 65. *Bill 162*, however, recognizes that permanent disabilities also impair the capacity of an injured worker to save for retirement. Consequently, the new provisions attempt to compensate for this loss directly, through the establishment of a retirement pension fund based on an amount equal to 10% of any compensation paid for loss of earnings. When the worker reaches retirement age, the fund and any interest earned on the amount contributed is to be used to purchase an annuity for the worker. If the accumulated fund is less than $1,000, however, then the amount is to be paid to the worker as a lump sum. Regulations will be established to determine survivor benefits in the event that the worker should die before receiving the full amount of his retirement pension.

REINSTATEMENT RIGHTS UNDER BILL 162

Under the pre-1989 Act, employers had no obligation to offer an injured worker employment once the worker had recovered from his injury. This is not to say that prior to *Bill 162* all employers were free of any obligations to re-employ injured workers. Many employers in the unionized workplace had some obligations included in their collective agreements. In addition, all Ontario employers are constrained by the *Human Rights Code* which prohibits discrimination on the basis of handicap. For all practical purposes, this prohibition requires an employer in any circumstances to re-employ an injured worker if the worker seeks that re-employment. The Code does not, however, require an employer to offer the re-employment in the first place.

Regardless of these statutory constraints, however, it was generally considered beneficial to attempt to re-employ injured workers either to their old position or to modified duties. Such attempts can aid in reducing the accident costs involved in a workers' compensation claim. More importantly, however, it is beneficial for overall employee relations if management is seen to be making an effort at re-employing its injured workers.

Notwithstanding these encouragements to re-employment, *Bill 162* now places specific obligations on employers to offer re-employment to workers injured at the workplace. These new obligations are intended to complement employers' pre-existing obligations including the provisions of collective agreements and the Code.

Scope of the Obligation to Re-employ

Bill 162 requires all employers who regularly employ 20 or more workers to offer re-employment to their injured workers who have recovered from their injuries. At one time, the construction industry was exempted from the re-employment provisions primarily because of the transitory nature of employment in this sector. This total exemption has been altered, however, and employers in the construction industry are now subject to such re-employment obligations as are prescribed by Regulation. These Regulations are currently being developed by the Board in consultation with employer and worker representatives.

The obligation to re-employ only applies to those workers who have been employed "continuously" for at least one year by the employer. The term "continuously" is not defined by the legislation but it could create difficulties where a worker has been employed for a particular task for successive periods, or where the period of employment has been broken by a leave of absence or other circumstances. Regardless, it is obvious that the length of employment can become an important issue and, therefore, the date of hire and other relevant dates should be carefully recorded in the worker's employment file.

Upon completion of the medical rehabilitation of an injured worker, the Board will determine, on the basis of medical evaluations from both the Board and from the worker's own physicians:

(a) whether the worker is medically able to perform suitable work; or

(b) whether the worker is medically able to perform the essential duties of the worker's pre-injury employment.

The criteria for determining the essential duties of a position are to be established by Regulation. From established jurisprudence under the Code, however, one can infer that specific duties will be considered essential if they:

(a) constitute a substantial proportion of the work;

(b) constitute an integral part of the position even though a minor aspect of it; or

(c) cannot be delegated to another person.

Employer's Obligation Regarding Suitable Work

Before the obligation to re-employ an injured worker can begin, the Board must first notify the employer that the worker is able to return to work. Upon receipt of this notice, the employer is required to offer that worker the first opportunity to accept any suitable employment that may come available with the employer. This obligation remains for a period of two years from the date of the injury. The criteria to determine what is "suitable work" are still to be established by Regulation. Nonetheless, combined with the employer's duty of accommodation, almost any position could be considered suitable depending on the extent of the accommodation requirement.

Employer's Obligations When a Worker is Able to Perform Pre-injury Employment

Upon receiving notice that the worker is medically able to perform the essential duties of the worker's pre-injury employment, the employer shall offer to reinstate the worker in the position the worker held on the date of the injury, or offer to provide the worker with alternative employment of a nature and at earnings comparable to the worker's employment on that date. Although the legislation states that the employer must offer re-employment upon receiving notice, it does not indicate when the reinstatement itself must begin. It is quite possible that *Bill 162* allows an employer, upon receiving notice, to offer the injured worker to be reinstated effective on a given date sometime in the future. In many ways, this interpretation is beneficial since it allows an employer a period of time in which to accommodate the workplace to meet the needs of the injured worker, or to realign its operations so that a position is made available.

Nevertheless, the language of *Bill 162* leaves open the possibility that the employer may offer reinstatement which is to be effective on a date considerably later than the worker would prefer to begin to return to work. The Board's interpretation of the legislation, however, indicates that an employer must not only offer re-employment to an injured worker immediately upon receiving notice from the Board but, in addition, that the re-employment must begin, if not immediately, then at least as soon as is practically possible. If this is ultimately the interpretation that is to be given to *Bill 162*, then it is even more important that employers keep in touch with the Board so that they can anticipate when the Board's determination will occur. This will allow an employer an opportunity to prepare the workplace prior to the determination being made. As well, it is essential that employers maintain contact with their injured workers as a further means of identifying when the worker will be able to return to work.

Duty of Accommodation

The inclusion of the duty to accommodate is probably the single most significant change to the workers' compensation system. It means that an employer may be required to radically modify both the work and the workplace in order to accommodate the needs of an injured worker. This can require an employer to:

(a) limit the types of duties involved in the position by re-assigning job functions and the like;

(b) modify the facilities, premises or equipment to overcome the limitations of the injured worker; or

(c) adjust the work schedule of the position including reduced hours or work week.

It is particularly significant for employers to realize that the statutory duty of accommodation is limited only by proof of undue hardship. This concept has received extensive interpretation in the area of human rights legislation. It suggests an extremely weighty burden on the employer when weighed against the infringement of the rights of the worker. In order to successfully refuse reinstatement, an employer will have to prove that extensive costs would be incurred in the event that the injured worker were to return to his pre-injury position. The resources and economics of any significant business operation will militate against a conclusion that the costs of accommodation represent undue hardship in most cases. The practical significance of this is that most employers in Ontario are now required to modify the types of work or the actual workplace in order to accommodate the reintegration of injured workers. [*Ed. note: See the article* OHRC Accommodation Guidelines, *at p.27 of this issue.*]

Duration of the Obligation to Re-employ

The duration of the obligation is carefully set out in *Bill 162*. The obligation lasts until the earliest of:

(a) two years after the date of the injury;

(b) one year after the employer is notified that the worker is medically able to perform the essential duties of the worker's pre-injury employment; and

(c) the date the worker reaches age 65.

A central problem with the duration clause in *Bill 162* is that it makes no allowances for intervening events. As a result, the employer's obligation remains regardless of the actions of the worker. For instance, where an employer has received notice of the fitness of the worker to perform the essential duties of his pre-injury employment, the

employer would be obligated to offer the worker his pre-injury employment for a period of up to one year. This would appear to remain even if the worker initially refused the offer of re-employment. *Bill 162* would even appear to allow a worker to work for another employer for 364 days and then demand his pre-injury employment from the employer on the 365th day. For employers desiring some certainty in their labour relations, this is an almost intolerable circumstance.

Penalties

There are extensive penalties under *Bill 162* for a breach of any of the elements of the obligation to re-employ. The penalties can amount to a maximum of the worker's net average earnings for the year preceding the injury. This is a direct penalty upon the employer in addition to any accident cost which would be charged to the employer's Accident Cost Record. It would appear that the penalty provisions are intended to approximate the wages that would have been paid to the worker if the employer had complied with its reinstatement obligations under *Bill 162*. Nonetheless, it is possible for the penalty imposed to be far more substantial. This is because the penalty provisions allow the Board to impose a maximum penalty of a full year's wages even if the employer's non-compliance was for a much shorter period of time. Whether the Board will impose a maximum penalty in these circumstances remains to be seen. Nevertheless, *Bill 162* entitles the Board to levy a penalty for a breach of any of the elements of the obligation to re-employ, including:

(a) a failure to offer to reinstate the worker once the Board has notified the employer that the worker is able to return to work;

(b) a failure to adequately accommodate the worker by modifying either the scope of work expected or the actual physical workplace itself; and

(c) termination of the worker within six months of his re-employment.

Where Does the Collective Agreement Fit In?

It is unclear how the terms of a collective agreement will affect the obligation to re-employ. On the one hand, *Bill 162* states that it will take precedence over the re-employment provisions contained in the collective agreement where the reinstatement rights granted by the Bill are greater than those provided for by the agreement. The Bill goes on to say that where the reinstatement rights provided in the collective agreement are broader than those under the Bill, then the terms of the agreement are to prevail. These provisions seem to contemplate a number of situations in which the obligation to re-employ will in fact overrule the negotiated terms of a collective agreement. The full scope of these provisions is unclear, however, insofar as the Bill also provides that in no case will the obligation to re-employ displace the seniority provisions of a negotiated agreement. It is very difficult to understand how the Bill can attain this objective to reinstate injured workers on the one hand without displacing any seniority provisions on the other. The conflict between the competing provisions of the Bill will have to be resolved eventually by the Tribunal.

VOCATIONAL REHABILITATION

The third key area of reform under *Bill 162* concerns the entitlement of injured workers to participate in a vocational rehabilitation program. Although vocational rehabilitation has always been considered of central importance to Ontario's workers' compensation system, the Board's efforts in this regard have been subjected to much criticism.

In response to these criticisms, *Bill 162* now provides for early intervention, increased resources, and greater involvement of workers and employers in planning rehabilitation programs. The intent of this emphasis is to ensure that more workers will be successfully re-integrated into the work force. Although most of the increased obligation rests with the Board, there is a large role to be played by employers in the development of effective programs. Employers have a strong incentive to participate in the rehabilitation of their injured workers as this will tend to reduce costs assessed to them.

Initial contact with the worker regarding rehabilitation is to be made by the Board within 45 days of the accident. At that time, the Board will attempt to identify the worker's need for rehabilitation services and, if appropriate, these services will be provided. Such services may include consultation and the planning and design of a vocational rehabilitation program. If after six months the worker is still unable to find employment

comparable to his pre-injury position, the Board will be under a positive obligation to contact the worker to offer a vocational rehabilitation assessment. If the worker is unable to undergo an assessment when contacted, the Board must renew the offer within a reasonable period after the worker becomes able to accept.

The assessment is a comprehensive evaluation of the worker's functional and physical capabilities. It covers such factors as personal interests, functional abilities, vocational skills, aptitude, educational attainment, literacy and language skills. Upon completion of the assessment, the Board will determine within 30 days after it receives the assessment results whether the worker needs a vocational rehabilitation program. Such a program may include vocational training, language training, general skills upgrading, refresher courses, employment counselling (including training in job search skills and in the identification of employment opportunities), assistance in seeking employment and assistance in adapting the workplace of an employer to accommodate the worker.

The employer's role in rehabilitation is to indicate what employment opportunities it can make available. The employer can also assist by co-ordinating with the Board to provide additional training to workers attempting to qualify for opportunities with the accident employer.

EMPLOYER STRATEGIES FOR EFFECTIVELY MANAGING THE OBLIGATIONS IMPOSED BY BILL 162

An essential theme running throughout the amendments contained in *Bill 162* is that now, more than ever before, employers have a greater responsibility in managing the compensation claims of their injured workers. While many employers may not wish to accept this responsibility, especially when it involves a positive obligation to re-employ injured employees, the fact remains that the regime created by *Bill 162* creates a unique opportunity for employers to actively participate in defining the scope of their commitment to workers' compensation and, more importantly, in ultimately reducing the cost of that commitment. To assist in this process, the following strategies and initiatives are designed to assist employers in formulating a coherent policy with respect to workers' compensation which will both minimize costs and promote greater positive employee relations. For convenience, the strategies are categorized under the same general headings as the above analysis of *Bill 162*.

Managing Claims for Permanent Disability Benefits Under the New Dual Award System

As indicated above, a central issue in determining the amount to which an injured worker is entitled for his loss of future earning capacity is what constitutes suitable and available employment in any given case. To assist the Board in making this determination, and thereby protect the employer from inflated claims, employers should maintain files that describe, as completely as possible, the personal and vocational characteristics of the injured worker. Relevant information should include: the worker's skills and abilities, any courses he may have taken, and what positions had been made available to him in the past. An outline of the specific physical requirements of any position held, including weights involved or motion studies made, should be included in the worker's file. These files should be retained for a considerable period since Board determinations regarding the economic loss caused by an injury could be made as long as six years after the initial injury.

With respect to claims for non-economic loss, employers will have less of an input in determining the amount of compensation paid to the worker insofar as compensation under this heading is calculated according to an objective rating schedule similar to the previous Meat Chart. Nevertheless, *Bill 162* does allow an employer to require a second medical assessment within 45 days of the first medical assessment, in the event that the initial determination of the worker's impairment is deemed to be inaccurate. As well, employers may appeal any decision of the Board regarding non-economic loss to the Tribunal. For these reasons, it is in the employer's interests to keep in touch with the injured worker while he is convalescing in order to gather sufficient information with which to decide whether a second medical assessment or appeal may be necessary.

Pro-active Strategies in Reinstating Injured Workers

The reinstatement provisions of *Bill 162* provide employers with the clearest opportunity to both reduce the costs of their workers' compensation contributions as well as foster positive employee relations through the re-hiring of injured workers.

Nevertheless, in view of the uncertainty surrounding the relationship of *Bill 162* with respect to the negotiated provisions of a collective agreement, and the statutory duties of the Code, employers should carefully assess their position before any injured employee is reinstated. For example, the Bill is silent with respect to the employer's obligations when two or more injured workers are available for employment at the same time. In order to reduce the obvious uncertainty created by this situation, therefore, employers should develop a rational and coherent policy for the re-employment of their injured workers, and attempt to re-integrate as many such workers as possible into the work force. The positive results of such a policy will be to promote an overall reduction in the costs of workers' compensation, and at the same time improve employee relations by demonstrating a commitment to the well-being of injured workers.

Keeping comprehensive files also assists employers to fulfil their obligations with respect to the re-employment of injured workers. Each file should contain a comprehensive evaluation of the vocational skills and abilities of the worker. This may then be used to evaluate the worker's suitability with respect to any position that may become available during the term of the obligation period. In addition, the files should record all dates of hire and other relevant dates with respect to each employee. This is essential because the duty to reinstate applies to employees who have been employed "continuously" for one year.

Developing an Effective Vocational Rehabilitation Program

Because *Bill 162* allows employers to play an integral role in the development of a vocational rehabilitation program for each employee, many employers will find it beneficial to compile a study of the physical requirements of specific positions or categories of positions within their companies. Such studies are useful in determining, in consultation with the Board, what would constitute suitable employment in any given case. The studies will also assist employers to explain why a particular position was not offered to a specific worker. It is essential that the studies are accurate and up-to-date. Listed physical requirements must reasonably relate to the actual duties of the position and must be updated whenever the duties are significantly changed. Furthermore, in a unionized workplace, an employer may want to negotiate these requirements with the union. Care should be taken, however, to ensure that such negotiations do not unduly limit the employer's ability to alter the duties of a position in the future.

Employers will also want to ensure that job description studies adopt the same classification scheme as is utilized in the personnel file of each injured worker. By adopting a comprehensive rating schedule, employers will be able to more effectively match injured workers with vacant positions, and as well will have a ready source of organized information to turn to in the event that a problem should arise with a workers' compensation claim. ■

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OHRC ACCOMMODATION GUIDELINES

*Greg Sones**

This article originally appeared in the October 1989 issue of ARCHALERT (Vol.4, No.5). We gratefully acknowledge the consent to its republication. Though this article expressly addresses "accommodation" under the Human Rights Code, 1981, it may provide guidance in interpreting the obligation to accommodate under s. 54b (6) of the Workers' Compensation Act, as amended by Bill 162.

At the end of September 1989, the Ontario Human Rights Commission released its guidelines for the interpretation of provisions in the *Human Rights Code, 1981*, S.O. 1981, c.53 (the Code) relating to the accommodation of the needs of people with disabilities, popularly known as reasonable accommodation for the disabled. Although not binding on the courts or boards of inquiry, the guidelines set out a basic framework by which complaints of discrimination on the basis of disability will be analyzed by the Commission.

The guidelines will be welcomed by disabled people, as they set out a vision for integration and accommodation which holds the promise of a society where discriminatory barriers are a thing of the past. For disabled people, the 1990s can become the decade of integration if barriers to employment, services, housing, recreational activities and education are challenged and removed as a consequence of the accommodation provisions in the Code. To this end, it is important that disabled people and their advocates understand what the Code and the Commission will require with respect to the removal of discriminatory barriers.

The following summary is being provided to help people with disabilities to understand the guidelines. People should obtain their own copy of the guidelines from the Commission and seek legal advice where necessary.

The Code outlines three factors which are to be considered in assessing whether an accommodation would cause undue hardship to an employer, landlord or service provider. These are:

a) the cost of the accommodation;

b) outside sources of funding for the accommodation;

c) health and safety requirements.

The Commission, through its guidelines, seeks to provide a framework for the interpretation of these three factors, and in doing so, incorporates the availability of outside sources of funding into its interpretation of the cost of the accommodation.

Central to determining whether an accommodation can be made without undue hardship are two standards:

a) the cost of the accommodation;

b) its impact on health and safety requirements.

It should be noted that not every case will raise both these standards — some cases will solely entail the application of the costs standard, while others will concern the safety standard alone.

One should also be aware that the philosophy behind the guidelines is that when an accommodation is required, it should be the one which most respects the dignity for the person with the disability and maximizes the person's integration and full participation in society. This approach shapes the analysis for identifying the type of accommodation that can be made without an undue hardship. For example, in a case involving an inaccessible store, one begins by assessing the cost of a ramp at the front entrance, not the cost of a ramp through the rear door. This doesn't mean that the accommodation must be the most expensive, but the accommodation must be the one most conducive to respecting a person's dignity and maximizing his or her equal opportunity.

With respect to the cost standard, in order for the cost of the accommodation to be considered an undue hardship, the person responsible for making the accommodation will have to show that the financial costs would "alter the essential nature" or "substantially affect the viability" of the person or enterprise responsible for the accommodation.

Such an approach to the interpretation of the cost standard is consistent with the broad public policy purposes of the Code which seeks to maximize equal opportunity. A lower standard would have made meaningless the protections available in the Code for disabled people, as well as its commitment to the achievement of equal opportunity. Consequently, this high standard is to ensure that many discriminatory barriers will be removed, since the government, large public sector agencies, and medium-to-large businesses will have difficulty satisfying this test.

In addition, the guidelines make clear that the assessment of whether a cost is an undue hardship should be done only after taking into consideration a variety of factors which may lessen the impact of the cost. For example, consideration should be given to whether the cost of the accommodation can be recovered through normal business practices or whether outside sources of funding are available. The guidelines list several other factors, all of which seek to establish the innovative ways in which the impact of the cost of an accommodation can be lessened. As the Commission emphasizes, "after all of these costs, benefits, deductions, and other factors have been considered, the next step is to determine whether the remaining cost will alter the essential nature of the enterprise responsible for making the accommodation or substantially affect its viability." Further, the person responsible for the accommodation will be required to show how the essential nature or viability of the enterprise is affected.

For disabled people and their advocates, portions of the guidelines dealing with the cost standard represent a break with the past. No longer will government, business, or service providers be able to avoid their obligations to remove discriminatory barriers just because there is an additional cost. With the Commission's approach to accommodation, these groups will have to establish that the cost is so significant that is will "alter the essential nature" or "substantially affect the viability" of these groups. It remains to be seen how this test will be applied by the Commission, boards of inquiry, and the courts. But disabled people and their advocates can look to the 1990s with great optimism, since the approach clearly rejects the previous *de minimis* cost standard that has been fashionable in human rights jurisprudence.

A word of caution is necessary in that the guidelines are not binding on the courts or boards of inquiry which may substitute their own interpretation of the accommodation provisions in the Code. If this happens, the provincial government will be under immense pressure to see that the guidelines are made binding on the courts and boards of inquiry.

The second component for determining whether an accommodation can be made without undue hardship is to assess the impact of the accommodation on health and safety. The interaction between health and safety requirements and human rights legislation continues to be problematic for disabled people. The primary purpose of this standard is to cover those cases where the alleged discrimination is on the grounds of a health and safety requirement necessitating an accommodation with respect to that requirement. In a nutshell, the standard proposed by the Commission is that undue hardship will be shown to exist where the degree of risk which remains after the accommodation outweighs the benefits of enhancing equality for disabled people.

The Commission outlines various factors to be taken into consideration for determining the significance and seriousness of the risk. These include:

- the willingness of the disabled person to assume the risk (where it is only to the person with the disability)

- whether there is a risk to third parties
- other risks that exist within the enterprise
- the type of risks which society generally tolerates
- the nature of the risk and type of harm that could occur
- the severity of the harm
- the probability of the harm occurring.

The Commission emphasizes that the evidence required to establish that an accommodation would be an undue hardship because of health and safety must be based on objective evidence.

The test proposed by the Commission for health and safety is long overdue, for too often in the past boards of inquiry and the courts have applied vague criteria in a random fashion to determine whether or not discrimination on the grounds of health and safety is justified. The Commission has enumerated a set of criteria which should assist the decision-makers in achieving an appropriate balance between the equal opportunity aspirations of people with disabilities and our societal concerns with health and safety.

In addition to the standards of cost and health and safety, the Commission is proposing an approach to accommodations which will require accommodations to be phased in where the cost of immediately implementing the accommodation would result in an undue hardship. Combined with the cost standard proposed by the Commission, this approach to the interpretation of undue hardship will have significant benefits for disabled people.

What this means is that where the cost of immediately removing a discriminatory barrier is too high, rather than dismissing a complaint of discrimination, a board of inquiry or a court should hold that discrimination has occurred because the accommodation can be phased in over a number of years.

The inaccessibility of public transportation might not be considered discriminatory if one were only to examine whether the needs of disabled people could be accommodated immediately without undue hardship. However, even if immediate accessibility would result in an undue hardship, the approach proposed by the Commission would require a second stage of analysis: is the cost of making public transportation accessible an undue hardship when phased in over a number of years? So, even if the accommodation cannot be made straight away, it may still be possible to make the accommodation over a number of years. Where this is possible, the respondent will not escape the obligations that exist under the Code.

Alternatively, the Commission proposes that respondents establish a reserve fund out of which the cost of the accommodation would be payed. The net result of this interpretation, when coupled with the high cost standard, is that very rarely will any respondent be able to successfully establish that an accommodation cannot be made. Of course, certain types of accommodations will be more amenable to this approach, such as structural modifications to buildings and work places, and different solutions may be required when one is dealing with human or technical supports that are immediately required.

The above standards must first be applied to the accommodation which maximizes the dignity of the disabled person. Only if it can be shown that such an accommodation would result in an undue hardship should one consider alternatives which fall short of this principle.

Finally, the Commission outlines what it perceives to be the proper approach for demonstrating undue hardship. The onus of proof rests with the person responsible for accommodation who must establish through objective evidence that the accommodation cannot be made without undue hardship. The Commission also believes that the person with the disability has the responsibility to make his or her needs known in order that the person responsible for the accommodation is in a position to implement an appropriate accommodation. This does not mean that a disabled person needs technical knowledge on accommodation, nor does it mean that the person will necessarily have to disclose confidential medical information.

The approach advocated by the Commission for the interpretation of the provisions in the Code dealing with accommodation is far-reaching. If the guidelines are upheld by boards of inquiry and the courts, the potential for removing discriminatory barriers that deny disabled persons the equal opportunity to participate will be dramatic. ■

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